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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. .....

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WESTERN AIR LINES, INC., a corporation,
*Respondent,*

*vs.*

CATHERINE J. MICHUNOVICH, Treasurer of Yellowstone County, Montana; YELLOWSTONE COUNTY; and THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA,
*Petitioners.*

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## Petition for Writ of Certiorari
TO THE SUPREME COURT OF MONTANA

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Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Montana, entered in the above cause on April 24, 1967 modifying the Judgment of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, and remanding the matter to the District Court with instructions to make and enter Judgment in favor of the

Respondents and against the Petitioners consistent with the views expressed in the Montana Supreme Court Opinion.

## OPINIONS BELOW

The Opinion of the Supreme Court of Montana is unofficially reported in 428 Pac.2d 3 (1967), but has not as yet been officially reported in the Montana Reports. This Opinion is shown commencing at page 1 of the Appendix. The District Court prepared no separate opinion but entered certain Findings of Fact and Conclusions of Law which are shown commencing at page 12 of the Appendix.

## JURISDICTION

After the initial decision of the Montana Supreme Court of April 24, 1967, an Order Denying Petition for Rehearing was entered on June 15, 1967. Thereafter, Remittitur was issued and final Judgment was rendered on June 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The Court below decided against Petitioners' contention that the value of Respondent's flight property operated in the State of Montana should be ascertained by an allocation from the value of the entire flight property operated by Respondent through the "unitary method" of assessment. The sole basis of

the decision rendered by the Court below was that the mode of assessment applied by Petitioners was not in harmony with the decisions of this Court that set forth the requirements of the due process clause of the Fourteenth Amendment of the United States Constitution relative to the taxation by a state of interstate transportation utilities. The lower Court specifically stated in its Opinion that a unitary method of assessment as was levied by Petitioners is sanctioned by the Montana laws regarding the assessment of airlines but could not be constitutionally applied to Respondent. (Appendix, p. 6.) Accordingly, the decision of the Montana Court involved a federal question of substance and Petitioners contend that it was not in accord with applicable decisions of this Court.

## QUESTION PRESENTED

The question presented by this Petition is whether a state may constitutionally apply the unitary method of assessment, described below, to an airline, less than 1% of whose passengers on its aircraft passing through the state transfer to or from other lines of the airline's system.

## STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are set forth verbatim commencing on page 29 of the Appendix.

## STATEMENT

Western Air Lines brought suit against Petitioners for the return of certain 1964 property taxes paid by it under protest. The Montana District Court afforded Western Air Lines a degree of relief. (Appendix, pp. 12-26.) Western Air Lines appealed to the Supreme Court of Montana, which granted additional relief. (Appendix, p. 1.)

The facts are as follows: In the assessment year 1964 Western Air Lines engaged in the business of commercially transporting passengers and cargo over certain connected flight routes in the United States and Canada. One of these routes passed through and stopped in Montana. The only aircraft that operated in Montana were older Douglas DC-6Bs. Concurrently with the operation of the Douglas DC-6Bs on the route that passed through Montana, Western Air Lines operated Prop Jet Electras and Boeing 720-Bs on flight routes that did not pass through or stop in Montana. (Complaint and admissions in Answer—Record.) Western Air Lines operated all its aircraft under the same general management (Appendix, pp. 7-8), and all capitalized net income and stock and debt figures submitted by Western Air Lines are those which cover its total operation (Exhibits to Stipulation—Record). None of the stock and debt or capitalized net income figures submitted by Western

Air Lines were ascertained solely from the operations of the flight route that passed through Montana. (Record.)

The method of assessment utilized by the Petitioner State Board of Equalization was as follows: The value of all Western Air Lines flight property was ascertained through a capitalized net income and a stock and debt approach. After this value was determined there was allocated to the State of Montana from this value Montana's share through utilization of certain allocation factors which were calculated to account for relative differences of aircraft operations in the State of Montana as compared with aircraft operations over the airline's entire system. (Exhibits 2 and 4 to Stipulation—Record.) This mode of assessment is known as a unitary method and is authorized by Section 84-6404, Revised Codes of Montana, 1947 (Appendix, p. 6.)

The Supreme Court of the State of Montana based the relief which it granted to Western Air Lines on the fact that less than 1% of the passengers on Western Air Lines aircraft that passed through Montana transferred to or from other lines of its system. (Appendix, pp. 7-8.) This fact demonstrated to the Court that there was a "total lack of significant 'organic unity' between the DC-6B operation and the rest of Appellant's [Western Air Lines] system," as must

exist in order that a system-wide "unitary" method assessment be valid. (Appendix, pp. 7-8.) The Court based this finding of lack of "organic unity" and the requirement that it must exist on the cases of *Fargo vs. Hart*, 193 U.S. 490, 48 L.Ed. 761; *Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, 210 U.S. 217; *U. S. Express Co. vs. Minnesota*, 223 U.S. 335; *Union Tank Line Co. vs. Wright*, 249 U.S. 275, 63 L.Ed. 602; *Pullman Company vs. Richardson*, 261 U.S. 330, 338, 43 S.Ct. 366, 368, 67 L.Ed. 682. (Appendix, pp. 3, 4 and 5.

## REASONS FOR GRANTING THE WRIT

In the case of an interstate business that is partly within and partly without a state, the assessment of the property located within that state may be ascertained by determining the full value of the business' entire system, and then allocating to the property located in that state a share of the total value of the business. *Fargo vs. Hart*, 193 U.S. 490, 48 L.Ed. 761; *Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, 210 U.S. 217; *U. S. Express Co. vs. Minnesota*, 223 U.S. 335; *Union Tank Line Co. vs. Wright*, 249 U.S. 275, 63 L.Ed. 602; *Pullman Company vs. Richardson*, 261 U.S. 330, 338, 43 S.Ct. 366, 368, 67 L. Ed. 682; *Southern Ry. Co. vs. Kentucky*, 274 U.S. 76, 81, 82; *Wallace vs. Hines*, 253 U.S. 66, 64 L.Ed. 782; *Blodgett vs. Holden*, 275 U.S. 142, 72 L. Ed. 206.

There are two tests which must be met in order that a unitary assessment be upheld. These tests are that the operation of the interstate business in the taxing state be an organic part of the entire business, and that the allocation of value from the entire business to the property located in the taxing state be proper. *Fargo vs. Hart*, 193 U.S. 490, 48 L.Ed. 761; *Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, 210 U.S. 217; *U. S. Express Co. vs. Minnesota*, 223 U.S. 335; *Union Tank Line Co. vs. Wright*, 249 U.S. 275, 63 L.Ed. 602; *Pullman Company vs. Richardson*, 261 U.S. 330, 338, 43 S.Ct. 366, 368, 67 L.Ed. 682; *Southern Ry. Co. vs. Kentucky*, 274 U.S. 76, 81, 82; *Wallace vs. Hines*, 253 U.S. 66, 64 L.Ed. 782; *Blodgett vs. Holden*, 275 U.S. 142, 72 L.Ed. 206. All of the cases relied upon by the lower Court dealt with the second issue, viz., was there a proper allocation of value from the entire system to the property located in the taxing state? There is only one case in which this Court was concerned solely with the question of whether the operation of the interstate business in the taxing state was an organic part of the entire system. *Southern Ry. Co. vs. Kentucky*, 274 U.S. 76, 81, 82.

Assuming that the operation of the interstate business in the taxing state is an organic part of the entire system, the sole bases upon which the allocation of value may be declared invalid are where the meth-

od of allocation is arbitrary or capricious, or the resulting tax is grossly excessive. (*Wallace vs. Hines*, 253 U.S. 66, 64 L.Ed. 782; *Blodgett vs. Holden*, 275 U.S. 142, 72 L.Ed. 206; *Union Tank Line Co. vs. Wright*, 249 U.S. 275, 63 L.Ed. 602; *Great Northern Railway Co. vs. Weeks*, 297 U.S. 135, 80 L.Ed. 532.) In the instant cause there has been no finding that the method of allocation utilized by the Petitioner State Board of Eqaulization was arbitrary or capricious, nor is there an express finding that the resultant assessment was grossly excessive. Therefore, the only basis upon which the lower Court's decision may be upheld is that the operation of the Western Air Line flight route that passed through the State of Montana was not an organic part of its entire system; and it is precisely on this point that the Montana Supreme Court based its decision. (Appendix, pp. 7-8.)

In the cases of *Wallace vs. Hines*, supra, *Blodgett vs. Holden*, supra, *Union Tank Line Co. vs. Wright*, supra, and *Great Northern Railway Co. vs. Weeks*, supra, and in all the cases cited by the lower Court, this Court indulged in the presumption that the interstate businesses involved were operated as a single unit, and that the only question remaining was whether the allocation of the total unit value to the property located in the taxing state was proper. The basis of the decision rendered by the Supreme Court of Montana is one which has never been utilized by

this Court in the determination of whether the operation of the interstate business in the taxing state was an organic part of the entire system. In *Southern Ry. Co. vs. Kentucky*, 274 U.S. 76, 81, 82, the Court held that the Southern Ry. Co. operation in the State of Kentucky was not an organic part of its entire system for a reason completely different than the one expounded by the lower Court.

Should this Court uphold the decision of the Supreme Court of Montana, sparsely populated states will be placed at a distinct disadvantage in their assessment of interstate businesses. There is a relatively small percentage of passengers and cargo that pass through these states which transfer to or from other lines of the interstate business' systems. Accordingly, if the yardstick established by the Supreme Court of Montana is upheld such states will be prevented from applying a unitary assessment to interstate businesses and thus deprived of the right to tax "the enhanced value which comes to the property in the State through its organic relationship to the system" (*Pullman Co. vs. Richardson*, 261 U.S. 330, 338).

## CONCLUSION

The assessment levied by the Petitioner State Board of Equalization on the flight property located in the State of Montana was based on a unitary method

which took into consideration the value of all Western Air Lines flight property. The method of allocation utilized was not arbitrary or capricious, and did not result in a grossly excessive tax. This assessment was made against an interstate business under the supervision of a single general management. The Judgment of the Supreme Court of Montana is based on a federal question of substance and is not in accord with the applicable decisions of this Court.

Respectfully submitted,

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